Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer who admittedly did not consider a female candidate for promotion, and who was not motivated by comparative qualifications at the time of the decision to promote a man, may respond to the woman's prima facie showing of discrimination under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), by asserting that the man had superior qualifications.

2. Where the only woman in a 30-employee department was admittedly qualified but not considered for promotion to a higher level position filled by a man, and where the 29 men in the department were *all* either already at the higher level or slated to be there in the near future, whether summary judgment against the woman was justified under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

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Karin Skold Van Slyke petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished decision of the Court of Appeals appears at App. A, 1a-7a. The opinion of the district court, which is reported at 115 F.Supp.2d 587 (D. Md. 2000), appears at App. B, 8a-23a. The district court's order appears at App. C, 24a-25a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 2001. Petitioner did not request rehearing. On November 21, 2001 the Chief Justice extended the time for filing this petition to December 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the application of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.* Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

Petitioner Karin Van Slyke, an engineer, was the only woman among the 30 engineers in her department at respondent Northrop Grumman Corporation. She was also the only engineer in the department denied Code 36 program management status. Van Slyke filed this Title VII action after she was passed over for three Code 36 positions in 1997; and the district court granted summary judgment in Northrop's favor on the basis of a rationale that admittedly did not motivate company officials at the time the promotion decisions were made. The Court of Appeals affirmed based on the district court's reasoning.

Van Slyke began working for Northrop's predecessor in 1978. In December 1997, she filed a Title VII charge with the Equal Employment Opportunity Commission, contending that she had repeatedly been passed over for promotion to

program management jobs (Code 36) because of her sex. EEOC issued a notice of right to sue, and Van Slyke then filed this suit in August 1998. Following discovery, Northrop moved for summary judgment, and the district court granted that motion. App. B, 8a.

In its decision, the district court first rejected certain aspects of Van Slyke's claim as untimely; this petition does not challenge that ruling. The court then addressed three timely promotion denials and held that, as to them, Van Slyke had made a prima facie showing that she was not promoted to Code 36 because of her sex. App. B, 15a-19a. The burden then shifted to Northrop to articulate a "legitimate, nondiscriminatory reason" for Van Slyke's rejection, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and the court believed that the company had satisfied this burden of articulation by asserting a "superior qualifications" defense, *i.e.*, that Van Slyke was less qualified than the three men who were promoted. App. B, 19a-21a.

Finally, the district court considered whether Van Slyke had "demonstrate[d] pretext," *Burdine*, 450 U.S. at 256, *i.e.*, whether she had "demonstrate[d] that the proffered reason was not the true reason for the employment decision." *Id.* Here the court said (erroneously) that Van Slyke had offered only two types of evidence of pretext—(1) statistics comparing the percentage of women employed by Northrop company-wide with the percentage of women managers, and (2) proof that she was better qualified than the promoted men. The court held that the statistical evidence was not probative, App. B, 21a-22a, and that Van Slyke had proved that she was "arguably *as qualified as*" the men but not that she was better qualified. *Id.*, 23a (emphasis in original). This, the court said, was not good enough, and it entered summary judgment for Northrop. *Id.*

On appeal, the Fourth Circuit first outlined the factual background of the case and then summarized the district

court's decision. App. A., 2a-6a. The recitation included certain undisputed facts relevant to pretext that had not been dealt with in the district court's opinion. For example, the appellate court said that Northrop admitted that Van Slyke's supervisors "knew [she] sought a Code 36 promotion." *Id.*, 2a. In addition, Northrop "concede[d] that Van Slyke could have held the specific positions given to [the three men] and that she was *not considered* for their specific positions." *Id.*, 4a (emphasis supplied). This occurred, moreover, in an environment in which Van Slyke was the only woman among the 30 engineers in her department, and in which "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions by the end of 1998." *Id.*

In its summary of the district court's decision, the Fourth Circuit noted that the lower court had "rejected Van Slyke's argument that Northrop Grumman was not entitled to a 'superior qualifications' defense by failing to consider her for the [three men's] specific positions." App. A, 5a. The Court of Appeals did not discuss the merits of this or any other aspect of the district court's decision; rather, it simply affirmed, without analysis, "on the reasoning set forth in the district court's order." *Id.*, 7a.

REASONS FOR GRANTING THE PETITION

Introduction. The Fourth Circuit allowed Northrop Grumman to rely on—and prevail on—an explanation for challenged conduct that admittedly did not motivate Northrop at the time the decisions at issue were made. This approach is fundamentally at odds with the EEO jurisprudence of this Court and the decisions of five other Circuits.

Disparate treatment cases focus on motivation; the issue is whether the employer made a challenged decision for a prohibited reason. Given the primacy of motive, any defense

offered by the employer must purport to explain its motivation for acting as it did. That was not true of the defense that the Fourth Circuit sanctioned here.

Karin Van Slyke alleged that she was denied promotion to a Code 36 management level position because of her sex, and she pointed to positions filled by three men. Northrop "knew Van Slyke sought a Code 36 promotion." App. A, 2a. And the company "concede[d] that [she] could have held" the three jobs in question but that she "was not considered" for them. *Id.*, 4a.

In the district court, Northrop sought to justify its actions by asserting that the men were better qualified than Van Slyke. But "'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). And here it was evident that Northrop was not animated by relative qualifications "at the time of the decision," *McKennon, id.*, *quoting Price Waterhouse, id.*, since the company did not consider Van Slyke at all.

In these circumstances, as Van Slyke argued below, Northrop did not sustain even the modest burden of articulation imposed by *Burdine*, 450 U.S. at 254, under which "the defendant must clearly set forth, through the introduction of admissible evidence, the *reasons* for the plaintiff's rejection" (emphasis supplied). The district court, however, "rejected [the] argument that Northrop Grumman was not entitled to a 'superior qualifications' defense" for the three jobs at issue. App. A, 5a. Indeed, the court held as a matter of law that Van Slyke could not overcome this defense, even though she could prove that she was as qualified as the three men selected. App. B, 23a. The district court entered summary judgment on this basis, and the Fourth Circuit affirmed, adopting the lower court's reasoning. App. A, 7a.

The Fourth Circuit's cursory affirmance directly conflicts with the teachings of this Court in *Burdine*, *Price Waterhouse* and *McKennon* concerning the necessity of assessing motivation as of the time a decision is made. No other appellate court has gone astray in this regard. Except for the Fourth Circuit here, every Court of Appeals to consider the issue has held that an EEO defendant may not successfully assert, in response to a prima facie case under *Burdine*, an explanation that did not motivate it at the time the challenged decision was made. These courts include the First Circuit,[1] the Third,[2] Eighth,[3] Ninth[4] and Eleventh.[5] The Court should grant this petition to correct the Fourth Circuit's misunderstanding.

In addition, even assuming that a "superior qualifications" defense was available to Northrop, the district court's entry of summary judgment ran afoul of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court ruled that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully

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[1] *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396 (1st Cir. 1990).

[2] *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part*, 65 F.3d 1072, 1073 (3d Cir. 1995).

[3] *Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985).

[4] *Nanty v. Burrows Co.*, 660 F.2d 1327 (9th Cir. 1981), *overruled on other grounds, O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996).

[5] *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Hill v. Seaboard C.L.R. Co.*, 767 F.2d 771 (11th Cir. 1985); *Joshi v. Florida State University Health Center*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.) *cert. denied*, 465 U.S. 1066 (1984).

discriminated." *Id.* at 148. And when assessing the sufficiency of the employee's evidence on summary judgment, a court "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe." *Id.* at 150-51.

In the present case, a jury would not be "required to believe" Northrop's assertion that Van Slyke was rejected for three Code 36 positions based on her qualifications, where the company conceded that she could have held the jobs but was not considered for them—and where it was undisputed that Van Slyke was the only woman among the 30 engineers in her department, and that "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions." App. A, 4a. This petition should also be granted to insure proper application of the principles in *Reeves* in the summary judgment setting.

Finally, given the plain error in the decision of the Court of Appeals, summary reversal would be appropriate. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268 (2001).

1. The primary issue in a disparate treatment case under Title VII is the motivation of the employer. The Fourth Circuit, however, permitted Northrop Grumman to respond to Karin Van Slyke's prima facie case by asserting a rationale that admittedly did not motivate company officials at the time the promotion decisions challenged by Van Slyke were made. This was error and ignored both the language of Title VII and this Court's decisions. No other Court of Appeals has made the same error.

a. Under § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), it is "an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex" (or race, religion or national origin). It is evident that the statute does not

proscribe any particular employment practices; rather, it outlaws only that conduct that is *motivated* by an impermissible criterion:

> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." * * * In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (citations omitted).

In light of this "factual inquiry," disparate treatment cases under Title VII focus on the motivation animating the challenged conduct, *e.g.*, a promotion denial. On rare occasions, there is direct evidence that the employer simply acted for a discriminatory reason, such as a written memo extolling a woman's qualifications but saying that female managers would be bad for business. These are easy cases—there is little question that the employer has violated § 703(a)(1)—and they usually settle.

b. In order "to compensate for the fact that direct evidence of intentional discrimination is hard to come by," *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring in the judgment), this Court has fashioned an analytical framework for assessing indirect, circumstantial evidence of intent in Title VII and other EEO cases. First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then respond by articulating a lawful reason for the challenged conduct; and finally the plaintiff has the opportunity to prove that the articulated rationale is not the defendant's true reason but is instead a pretext for discrimination. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, *supra*; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The Court has over the years refined the original *McDonnell Douglas* model. Thus *Burdine* clarified that the defendant's burden in responding to a prima facie case is one of production, not proof. 450 U.S. at 254 ("[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons"). And *Hicks* and *Reeves* explained that "the fact-finder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff," but that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-47 (emphasis in original).

The Court has not expressly considered whether an employer may respond to a prima facie case under *McDonnell Douglas* and *Burdine* by asserting a rationale that did not motivate it at the time the decision was made. Still, it "seem[s] evident that the term 'motivation' clearly contemplates defendant's mental state at the time of an action." *Sabree*, 921 F.2d at 403. In any event, as the First Circuit in *Sabree* also noted, *id.*, "the Supreme Court made this crystal clear in *Price Waterhouse v. Hopkins*," a mixed-motives case.

The Court in *Price Waterhouse* emphasized that motivation must be assessed as of the time that the decision under scrutiny was made:

> The present, active tense of the operative verbs of § 703(a)(1) . . . turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*.

490 U.S. at 240-41 (emphasis in original). Thus,

> [i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the . . . employee was a woman.

Id. at 250 (emphasis supplied). Finally, because Title VII deals with motivation, an employer may not defend only by showing that the challenged decision made sound business sense:

> [P]roving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" * * * An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of the decision.*

Id. at 252 (citations omitted) (emphasis supplied).

The language quoted is from the plurality opinion in *Price Waterhouse*, but a unanimous Court adopted the same approach to assessment of motivation in *McKennon v. Nashville Banner Pub. Co., supra. McKennon* presented a permutation in the area of disparate treatment—the situation in which it is assumed (or conceded) that the reason for the challenged action was discriminatory when made, but in which the employer later discovered a lawful reason that would have justified the action. The Court held that such "after-acquired evidence" could limit relief but would not affect liability. This was because such evidence, by definition, had no bearing on the employer's motivation at the time the decision was made:

> McKennon's misconduct was not discovered until after she had been fired. The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason. Mixed motive cases are inapposite here, except to the important extent they

> underscore *the necessity of determining the employer's motives* in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (employer's legitimate reason for discharge in mixed-motive case will not suffice "if that reason did not motivate it *at the time of the decision*"); *id.*, at 260-261 (White, J., concurring in judgment); *id.*, at 261 (O'Connor, J., concurring in judgment). As has been observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Id.*, at 252 (plurality opinion) . . . *see also id.*, at 260-261 (White, J., concurring in judgment).

513 U.S. at 359-60 (parallel citations omitted) (emphasis supplied).

c. Other Courts of Appeals have recognized that an employer may not successfully defend under *Burdine* by asserting an explanation that did not motivate it at the time the challenged decision was made. In *Joshi v. Florida State University Health Center*, *supra*, the Eleventh Circuit considered a situation in which the defendant had "attempted to rebut [plaintiff's] prima facie case by showing that the males hired or offered the position were at least as qualified as she." 763 F.2d at 1235. The court held that "[t]his articulated reason is insufficient as a matter of law. * * * Because [plaintiff] was not considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her." *Id.* *Joshi* was remarkably similar to the present case,[6] as was *Eastland v.*

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[6] Despite the district court's attempt to distinguish it, *Joshi* is virtually identical factually to Van Slyke's situation. The relevant decision-makers were generally aware of Dr. Joshi's qualifications, because she had earlier applied for other positions. But the "district court found that 'the plaintiff

Tennessee Valley Authority, *supra*, 704 F.2d at 626 ("TVA's decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered").

Other Eleventh Circuit decisions have applied the same principle, *e.g.*, *Hill v. Seaboard C.L.R. Co.*, *supra*, 767 F.2d at 774 ("[o]f course, failure to promote a plaintiff because the person actually promoted was more qualified is a nondiscriminatory reason, but the articulation of that reason must include the fact that the decision-maker knew that the promoted individual's qualifications were superior at the time the decision was made"); *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, *supra*, 901 F.2d at 925 (same).

The First Circuit is equally emphatic. In *Sabree*, 921 F.2d at 404, the court first cited *Price Waterhouse*, then held:

> Although *Price Waterhouse* is a mixed motive, direct evidence case and Sabree's case is a circumstantial evidence case governed by *McDonnell Douglas*, *Price Waterhouse's* directive to essentially take a snapshot at the moment of the allegedly discriminatory act is applicable to all Title VII cases.
>
> * * *
>
> Unless . . . a defendant articulates a "legitimate nondiscriminatory reason" that *actually* motivated the decision, the reason is legally insufficient.

(Emphasis in original.) The court noted that, "[i]n cases using the *McDonnell Douglas* framework, the defendant bears only a production burden, not a burden of persuasion as

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was not actively considered for hiring' during [the] period" when the job at issue was filled. 763 F.2d at 1235. And "because Joshi's qualifications were not considered, [defendant] cannot rely on its contention that other candidates were better qualified to explain its decision not to hire her." *Id.*

in *Price Waterhouse*, direct evidence, cases. Although the burden is lighter, the inquiry remains the same—the defendant's actual motivation." *Id.*, n.16.

The Third Circuit signaled its concurrence in *Mardell v. Harleysville Life Ins. Co.*, *supra*, 31 F.3d at 1229, an after-acquired evidence case that predated this Court's decision in *McKennon* ("under the mixed-motives analysis, the employer in an after-acquired evidence case cannot contend that it would have reached the same decision at the time it was made absent the illicit motive. Concomitantly, *under the pretext analysis*, it should be simple for the employee to demonstrate beyond peradventure that the proffered legitimate (but after-acquired) reason was not the true cause for the decision but is merely a 'pretext' ") (emphasis supplied).

In an early post-*Burdine* decision, *Nanty v. Burrows Co.*, *supra*, the Ninth Circuit considered a situation in which a Native American had been summarily rejected for a truck driving job in Arizona. The employer sought to argue that the applicant would not have been qualified, but the court rejected that contention, since the decision to reject Nanty was not motivated by any concern about qualifications:

> We now turn to step two of the *McDonnell Douglas* analytic process, and consider the question whether Barrows "articulate(d) a legitimate nondiscriminatory" reason for Nanty's rejection. At step two of the *McDonnell Douglas* analysis, the defendant must show, "through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255 (emphasis added) (footnote omitted). Barrows makes several arguments explaining why Nanty would not have been hired as a furniture delivery truck driver. However, these arguments are simply not relevant here, since none explains the reason for Nanty's rejection. Barrows knew nothing about Nanty at the time of the rejection and offers no explanation for its action in rejecting Nanty. Thus Barrows has totally failed to

> "articulate a legitimate nondiscriminatory" reason for Nanty's rejection and to meet its step two burden.
>
> * * * Since Barrows offered no explanation for its decision to reject Nanty, it remained "silent in the face of the presumption" created by Nanty's prima facie case. *Burdine*, 450 U.S. at 254. Thus, Nanty's prima facie showing is sufficient to meet his ultimate burden of proving unlawful discrimination under *McDonnell Douglas*.

660 F.2d at 1332 (parallel citations and footnote omitted).

The Eighth Circuit cited *Nanty* and followed the same path in *Lams v. General Waterworks Corp.*, *supra*. In *Lams*, as in the present case, the plaintiffs "never were actually considered for the positions in dispute, and thus were not compared with the successful candidates." 766 F.2d at 391. And given the lack of actual comparisons at the time the selections were made, the employer could not assert comparative qualifications as a defense:

> The Waterworks' *post hoc* comparisons between the employees who were promoted and plaintiffs fail to explain why plaintiffs were not interviewed or considered for the positions, especially in light of the Waterworks' concession that both plaintiffs were qualified for the positions sought.

Id. at 393. In similar fashion, Northrop Grumman here conceded that Karin Van Slyke "could have held" the three jobs at issue but "was not considered" for them. App. A, 4a.

In sum, the decisions of the Courts of Appeals apart from the Fourth Circuit are uniform and accord with this Court's precedent: in an EEO case subject to the *McDonnell Douglas/ Burdine* framework, a defendant may *not* respond to the plaintiff's prima facie case by articulating a rationale that did not motivate it at the time of the challenged action. Only the Fourth Circuit in the present case has sanctioned a deviation from this principle.

d. There is no question that the Fourth Circuit condoned Northrop Grumman's reliance on a rationale—the "superior qualifications" of the men chosen for the three jobs at issue—that did not motivate the company's officials at the time the promotion decisions were made. Indeed, as the court said, Northrop "concede[d] that Van Slyke could have held the specific positions given to [the three men] and that she was *not considered* for their specific positions." App. A, 4a (emphasis supplied). And if Van Slyke was not considered, it follows that Northrop did not reject her based on her credentials. Whatever else may have been in the decision-maker's mind at the time, it was not an assessment of relative qualifications.

Van Slyke argued below that Northrop could not rely on a "superior qualifications" defense. First, there was no foundation for this defense on the merits, given the concession that Van Slyke was not considered for the jobs at issue. Second, not a single Northrop official said that Van Slyke was rejected for the promotions in question because she was less qualified than the men chosen, and the company has never cited any such statement. There was no deposition testimony to this effect; nor did Northrop submit any affidavits from the pertinent officials. Rather, the "superior qualifications" defense was an argument of counsel that appeared for the first time in Northrop's summary judgment brief, and that is not sufficient under *Burdine*. *See* 450 U.S. at 254 n.9 ("[a]n articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely . . . by argument of counsel").

In any event, the Fourth Circuit noted that the district court had "rejected Van Slyke's argument that Northrop Grumman was not entitled to a 'superior qualifications' defense by failing to consider her for the [three men's] specific positions." App. A, 5a. The Court of Appeals did not discuss the merits of the district court's reasoning but simply added that

the court "had distinguished the line of cases Van Slyke relied upon . . . and explained that Northrop Grumman was aware of Van Slyke's qualifications and 'repeatedly met with her to discuss positions in accord with her qualifications and skills.'" *Id.* This is a *non sequitur*. Northrop's general awareness of Van Slyke's qualifications, and meetings that may have occurred concerning *other* jobs, do not erase the concession that she was not considered for the positions filled by the three men. For these jobs—the ones at issue in this case—Northrop did not compare her qualifications with those of the men, because the company did not consider her at all.

Nor was this a situation in which a woman was not considered because an employer, generally aware of her qualifications, felt that she was not up to the job. On the contrary, as the Court of Appeals observed, Northrop "concede[d] that Van Slyke could have held the specific positions" given to the men. App. A, 4a. And the district court said that the record would support a finding that Van Slyke was as qualified as the men. App. B, 23a.

Northrop Grumman failed to consider Karin Van Slyke for the three positions that she sued about. Given that failure, the company could not defend its decision to select three men by asserting that they were better qualified than she. Northrop did not meet its burden of articulation under *Burdine*.

2. Even assuming that a "superior qualifications" defense was available to Northrop, the district court erred in granting summary judgment, and the Court of Appeals necessarily erred in affirming based solely on the district court's reasoning. The district court ruled that Van Slyke had shown that she was "arguably *as qualified as* the three men promoted," but not that she was "*more* qualified—the burden which plaintiff must satisfy at the pretext stage." App. B, 23a (emphasis in original). Putting to one side the propriety of this type of nuanced determination about qualifications on summary judgment, it is just wrong to suggest that an EEO

plaintiff can prove pretext only by showing that she was better qualified than the man chosen. On the contrary, this Court has held that plaintiffs must be afforded broad latitude in demonstrating the pretextual nature of the employer's defense:

> Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. * * * In doing so, petitioner is not limited to presenting evidence of a certain type. * * * The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. * * * Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing.

Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989) (citations omitted) (emphasis in original).

The district court (and hence the Court of Appeals in affirming) sought to distinguish *Patterson* by saying that Van Slyke had failed to prove her "sole alternative means of demonstrating pretext," *i.e.*, the use of company-wide statistics on women in management. App. B, 22a n.8. In fact, though, as the Fourth Circuit noted, Van Slyke offered other evidence of pretext, beyond that mentioned by the district court. For example, she was the only woman among the 30 engineers in her department; she could not get a Code 36 job; and "all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions." App. A, 4a. In addition, Northrop conceded that Van Slyke was not considered for the jobs at issue, even though she "could have held" them. *Id.*

When assessing the sufficiency of an employee's evidence of pretext on summary judgment, a court "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe." *Reeves*, 530 U.S. at 150-51. In the present case, the jury was hardly "required to believe" that the company's action in passing over Van Slyke had anything to do with her credentials. After all, Northrop did not even consider her, and all 29 men in her department got more favorable treatment.

The award of summary judgment based on relative qualifications was flatly contrary to *Patterson* and *Reeves*. But Northrop should not have been permitted to assert a "superior qualifications" defense in the first place.

3. The decision of the Fourth Circuit in this case is unpublished, but it is emblematic of that court's sometimes parsimonious approach to cases arising under Federal anti-discrimination legislation. *See, e.g., Hetzel v. Prince William County*, 523 U.S. 208 (1998) (unanimously and summarily reversing unpublished decision of Fourth Circuit in TitleVII/ § 1983 case); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (unanimously reversing decision of Fourth Circuit in Title VII case); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) (unanimously vacating and remanding unpublished decision of Fourth Circuit in Title VII/§ 1981 case); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) (unanimously reversing and remanding decision of Fourth Circuit in Age Discrimination in Employment Act case); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (unanimously vacating and remanding unpublished decision of Fourth Circuit in Americans with Disabilities Act case).

Review by this Court is necessary in the present case to insure that there is proper application of the Court's

precedent. Given the nature of the case, summary reversal would be appropriate. See *Hetzel v. Prince William County, supra*; *Clark County School District v. Breeden, supra.*

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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